The specific grounds of this Motion are:

1. The test applied by the Trial Court and the Court of Appeals is not the correct test to determine patentability under 35 U.S.C. 103 and is contrary to and in conflict with the Supreme Court decision dated February 21, 1966, of *Graham, et al. v. John Deere Company of Kansas City, et al.; Calmar, Inc. v. Cook Chemical Company; Colgate-Palmolive Company v. Cook Chemical Company, supra.*

2. The Trial Court failed to make the following "basic factual inquiries" required by the Supreme Court cases of *Graham, et al. v. John Deere, et al., etc.*, which are:

a. A factual determination of "the scope and contents of the prior art";

b. A factual determination of the "differences between the prior art and the claims" of the Swift patent;

c. A factual determination of "the level of ordinary skill in the pertinent art".

3. The Trial Court failed to make Findings of Fact with respect to the factual inquires demanded by the above-referred to Supreme Court decisions as follows:

a. Findings of Fact as to "the scope and contents of the prior art";

b. Findings of Fact as to the "differences beveen the prior art and the claims" of the Swift patent;

c. Findings of Fact as to "the level of ordinary skill in the pertinent art".

and, therefore, there was no proper factual basis on which the Trial Court could reach its judgment and no proper basis on which the Court of Appeals could determine the basis on which the Trial Court reached its judgment.

McCullough Tool Company further moves this Honorable Court for an order requiring the Trial Court to fill a total vacancy in the Findings of Fact and to make Findings of Fact:

1. As to "the scope and contents of the prior art";

2. As to the "differences between the prior art and the claims" of the Swift patent; and

3. As to "the level of ordinary skill in the pertinent art".

If the factual determinations required by the Supreme Court are made this Court will reverse its decision as to Swift and hold it invalid.

Swift combined a magnetic casing collar locator and a standard type of radioactivity logging instrument, and sent signals over a single conductor for recording at the surface of the ground (all of these elements being old in the art, Finding 63 (R. 86), 199 Fed. Supp. 378). The Schlumberger public use employed the same combination of elements for simultaneously recording gamma ray and casing collar signals. Schlumberger employed a mechanical casing collar locator, which is the mechanical equivalent of Swift's magnetic collar locator. Schlumberger sent casing collar signals and radioactivity signals to the surface of the ground through either a single conductor in one instrument or two conductors in another instrument, for simultaneously re-

cording by separate pens. Schlumberger's Geiger counter detected the formations and its casing collar located the collars (R. 1048 and 1047).

The Bender Patent No. Re. 23,226 (Ex. 1a, R. 1100) taught that gamma rays could be detected in a cased well by a Geiger counter and that this information, when sent to the surface of the ground, would locate oil bearing formations.

Schlumberger taught that the Geiger counter and a casing collar could be combined for simultaneously recording formation signals and casing collar signals.

Ramsay recognized that the Geiger counter measured the radioactivity bullets and also detected natural gamma rays emitted from the formations.

Neither the Trial Court[2] nor the Court of Appeals considered, as they should have, whether the level of skill in the art was such that a person acquainted with the Schlumberger device would have been able to operate it in the same manner and for the same purpose as the Swift device. The Swift device does not function any differently than the Schlumberger device when it was recording formations and casing collars as shown in Exhibit 215, and all that Swift did was to use the Schlumberger combination to simultaneously record formations and casing collars in wells where no radioactive bullets had been installed. This different

[2]The Trial Court in this case at no time attributed to the Swift device any "unexpected", "operating characteristics" or "unusual and surprising consequences", nor was there a showing that "anyone", "noted expert" or "journeyman", ever expressed disbelief in the results of the operation of the Swift device, such as found by the Supreme Court in *United States v. Adams*, which is one of the decisions rendered by the Supreme Court on February 21, 1966.

yet analogous use of Schlumberger, when considered in conjunction with the Bender patent, the Doll patent, and the Castel patent, was obvious to a person of ordinary skill in the art, and, therefore, Swift is invalid under 35 U.S.C. 103.

If a person skilled in the art were, at the time of Swift's alleged invention, given the problem of simultaneously logging formations and locating casing collars, the prior art would have provided him with the answer.

For a complete discussion of the facts see the Memorandum accompanying this Motion, p. 20, Vol. II.

If the Court will make the three factual determinations required by the Supreme Court decisions of *Graham, et al. v. John Deere, et al.*, it will be compelled to conclude that the adding of a magnetic casing collar locator to the well-known radioactivity logging instrument was, at the time Swift did this, obvious to a person of ordinary skill in the art.

There are extraordinary and compelling circumstances which require this Court to grant appellant's Motion or alternative Motion:

1. All of the public who deal in petroleum products is affected. The Swift patent involved in this litigation has been licensed to substantially the entire well drilling industry which pays royalties to Dresser Industries.

2. There have been sixteen law suits filed for infringement of the Swift patent in different parts of the country. Only one of these suits has been tried, namely, the present one, and in this case the judgment is erroneous because it is based on the wrong test which has been struck down by the Supreme Court.

All of the other cases, except Well Surveys, Inc. v. Perfo-Log, Inc., Western District of Oklahoma, have been terminated by Consent Judgment or dismissed, with defendants taking a license or going out of business (See Memorandum accompanying this Motion, p. 11, Vol. II). In a number of instances the industry has yielded to taking a license or immunity agreement based on representations that the patent has been held valid in this Tenth Circuit. (See Memorandum accompanying this Motion, p. 11, Vol. II).

3. Dresser, following the interlocutory judgment in this case misrepresented the scope of the claims of Swift, and forced small operators to sign immunity agreements on the basis that Swift claims covered separate cables for separately carrying casing collar signals and radioactivity signals to the surface of the ground, whereas the Trial Court and Court of Appeals had *already adjudicated* that claims are limited to combining signals and sending signals to the surface of the ground over a single cable. (See Memorandum accompanying this Motion, p. 11, Vol. II).

4. Patents are of paramount public interest and the public at large will suffer if the present decision of validity of the Swift patent is allowed to stand. (See Memorandum accompanying this Motion, p. 8, Vol. II).

This Court has the inherent plenary power to vacate its erroneous interlocutory judgment. Where an interlocutory judgment is involved a rehearing may be sought at any time before final judgment provided due dili-

gence be employed and a revision be otherwise consonant with equity. (*Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 90, 91).

It is our position that:

1. The decision of this Court is interlocutory and does not become final "until the conclusion of the accounting";

2. This Court has the "power at any time prior to the entry of its final judgment at the close of the accounting to reconsider any portion of its decision and to reopen any part of the case"; and

3. This Court is "free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to [remand and] reopen the case for further evidence."

Our position is substantiated by the following quotation from *Marconi Wireless Co. v. U.S.*, 320 U.S. 1, 47, 48;

> "Although the interlocutory decision of the Court of Claims on the question of validity and infringement was appealable, *United States v. Esnault-Pelterie*, 299 U.S. 201, 303 U.S. 26; 28 U.S.C. §288(b), as are interlocutory orders of district courts in suits to enjoin infringement, 28 U.S.C. §227(a); *Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 89, the decision was not final until the conclusion of the accounting. *Barnard v. Gibson*, 7 How. 649; *Humiston v. Stainthorp*, 2 Wall. 106; *Simmons Co. v. Grier Bros. Co., supra*, 89. Hence the court did not lack power at any time prior to entry of its final judgment at the

close of the accounting to reconsider any portion of its decision and reopen any part of the case. *Perkins v. Fourniquet*, 6 How. 206, 208; *McGourkey v. Toledo & Ohio Central Ry. Co.*, 146 U.S. 536, 544; *Simmons Co. v. Grier Bros. Co., supra*, 90-91. It was free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to reopen the case for further evidence."

The Motion was timely made. Following this Court's decision on March 17, 1961 [65] (343 F. 2d 381), appellant filed a Petition for Rehearing which was denied and this was followed by a Petition for Writ of Certiorari before the Supreme Court. On February 21, 1966, the Supreme Court decided the *Graham, et al. v. John Deere, et al.* cases, whereafter McCullough Tool Company prepared and filed this Motion (See Memorandum accompanying this Motion, p. 14, Vol. II).

At the hearing of this Motion the party McCullough Tool Company will rely upon all papers and pleadings on file herein, the attached Affidavits and Points and Authorities, Memorandum and the accompanying Motion for the District Court.

Dated: July 15, 1966.

R. WELTON WHANN,
ROBERT M. MCMANIGAL,
RICHARD B. MCDERMOTT,
By R. WELTON WHANN,
Attorneys for Appellant McCullough Tool Company.

MEMORANDUM OF POINTS AND AUTHORITIES.

I.

On motion and upon such terms as are just, the Court may relieve a party from an interlocutory judgment, order, or injunction.

Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 89.

Marconi Wireless Co. v. United States, 329 U.S. 1, 47, 48, in which the Court held:

"Although the interlocutory decision of the Court of Claims on the question of validity and infringement was appealable, *United States v. Esnault-Pelterie*, 299 U.S. 201, 303 U.S. 26; 28 U.S.C. §288(b), as are interlocutory orders if district courts in suits to enjoin infringement, 28 U.S.C. §227(a); *Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 89, the decision was not final until the conclusion of the accounting. *Barnard v. Gibson*, 7 How. 649; *Humiston v. Stainthorp*, 2 Wall. 106; *Simmons Co. v. Grier Bros. Co., supra*, 89. Hence the court did not lack power at any time prior to entry of its final judgment at the close of the accounting to reconsider any portion of its decision and reopen any part of the case. *Perkins v. Fourniquet*, 6 How. 206, 208; *McGourkey v. Toledo & Ohio Central Ry. Co.*, 146 U.S. 536, 544; *Simmons Co. v. Grier Bros. Co., supra*, 90-91. It was free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to reopen the cause for further evidence."

II.

While the applicable law is somewhat similar to the provisions of Rule 60(b) of the Federal Rules of Civil Procedure, this Motion is not made under that Rule, since Rule 60(b) is expressly limited to "final" judgments, orders or proceedings.

Federal Rules of Civil Procedure, Rule 60(b).

III.

Relief from an interlocutory judgment may be sought and granted after an appeal and after Mandate to the Trial Court.

Sun Oil Co. v. Burford, 130 F. 2d 10, 13 (C.A. 5, 1942) in whicch the Court held at page 13:

> "Our rules do not contemplate a second petition for rehearing, but this one was allowed to be filed because of an alleged conflict within the circuit of decisions rendered by this court at this term. Although the mandate in this case has been sent down, there is no reason why it may not be recalled by the court during the same term to prevent injustice."

Bros Incorporated v. W. E. Grace Manufacturing Company (C.A. 5, 1963), 320 F. 2d 594.

IV.

A Court has the plenary power to grant relief against interlocutory judgments where enforcing the judgment would be contrary to justice, because of matters arising subsequent to the rendition of the judgment.

Sun Oil Co. v. Burford (C.A. 5, 1942), 130 F. 2d 10, 13;

Oliver v. City of Shattuck (C.A. 10, 1946, Circuit Judge Murrah speaking for the Court), 157 F. 2d 150, 152 and 153.

V.

A decision in a patent case which adjudicates validity and infringement, orders the issuance of injunction, and is final except for the accounting, is an interlocutory judgment.

Title 28 U.S.C., Paragraph 1292(4);

Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 89;

Marconi Wireless Co. v. United States, 120 U.S. 1, 47.

VI.

It is the duty of every Court to determine patent validity by carefully examining 35 U.S.C. 103 and determine the scope and content of the prior art, the difference between the prior art, and the claims at issue, and the level of ordinary skill in the pertinent art. Matter of obviousness or nonobviousness must be determined against this threefold factual background.

Graham, et al. v. John Deere Company of Kansas City et al.; Calmar, Inc. v. Cook Chemical Company; Colgate-Palmolive Company v. Cook Chemical Company, ... U.S. ....., 15 L. Ed. 2d 545, 148 U.S.P.Q. 459.

VII.

Where validity of a patent is involved public interest in a governmentally bestowed monopoly is of transcendent importance and the subject matter is of such great public interest and exceptional and compelling circumstances warrant rehearing under equitable principles.

"Another factor, perhaps of even greater importance, is the nature of this litigation. The issue is the validity of a patent. The public interest in a governmentally bestowed monopoly is of transcendent importance. This led us to an extraordinary action fifteen years ago when, in response to a petition for rehearing after the announcement of our earlier opinion, we suspended our mandate and referred back to the District Court a part of the case for further evidence and findings. Zachos v. Sherman-Williams Co., 5 Cir., 1948, 166 F.2d 79, and after recertification, 177 F.2d 762. There we pointed out 'A patent is a monopoly granted by the public and is of public interest, and ought to exist against all or none.' * * *"

Bros Incorporated v. W. E. Grace Manufacturing Company, 320 F.2d 594, 609, 610 (C.A. 5, 1963)

"* * * The public is a silent but an important and interested party in all patent litigation, and is entitled to protection against the monopolization of what is not lawfully patentable. Rota-Carb Corporation v. Frye Manufacturing Company, 8 Cir., 313 F.2d 433, 444 (1963). * * *"

John Deere & Co. v. Graham, 333 F.2d 529, 535 (C.A. 8, 1965).

"* * * The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize

the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored. * * *"

Graham v. John Deere & Co., ... U.S. ...., 15 L.Ed. 2d 550, 148 U.S.P.Q. 459.

Certificate of Counsel.

It is hereby certified in our judgment the foregoing Motion is well founded and is not interposed for delay.

R. WELTON WHANN,
315 West Ninth Street,
Los Angeles 15, California,
Attorney for Appellants.

Los Angeles, California, July 15, 1966.

Exhibit 1.

AFFIDAVIT OF R. WELTON WHANN

State of California County of Los Angeles ss.

R. Welton Whann, being first duly sworn, deposes and says:

That he is an attorney at law and is an attorney for the McCullough Tool Company in this litigation.

That affiant is informed and believes that the Swift Patent No. 2, 554,844 has been involved in the following litigation, in addition to the present suit:

Title	Where Filed	Filing Date	Disposition of Suit
Well Surveys, Inc. v. Welex, Inc.; Welex Jet Services, Inc.; and Halliburton Co.	Northern District Oklahoma (Tulsa) No. 5145	Mar. 20, 1961	Dismissed
Well Surveys, Inc. v. Black Gold Logging & Perforating, Inc.	Northern District Oklahoma (Tulsa) No. 5310	Dec. 12, 1961	Dismissed
Well Surveys, Inc. v. Perfo-Log, Inc.	Western District Oklahoma No. 9542	Dec. 26, 1961	Pending
Well Surveys, Inc. v. Comet Guns, Inc.	Eastern District Oklahoma (Muskogee) No. 5097	Dec. 29, 1961	Default Judgment
Well Surveys, Inc. v. Tech. Eng. Petroleum Service Co., Inc.	Southern District Texas (Houston) No. 14,264	Apr. 11, 1962	Dismissed
Well Surveys, Inc. v. Go Services, Inc.	Northern District Texas (Abilene) No. 2115	June 14, 1962	Consent Judgment
Well Surveys, Inc. v. Trainer Surveys, Inc.	Western District Louisiana (Shreveport) No. 8880	June 14, 1962	Dismissed
Well Surveys, Inc. v. Subsurface Completion Services, Inc.	Eastern District Louisiana (New Orleans) No. 12,510	Aug. 6, 1962	Dismissed

Title	Where Filed	Filing Date	Disposition of Suit
Well Surveys, Inc. v. Guns, Inc.; E. A. Owens and Leon Pyle	Western District Louisiana (Shreveport) No. 9237-S	Dec. 26, 1962	Final Judgment Dismissed
Well Surveys, Inc. v. Great Guns, Inc.	District Kansas (Wichita) No. W-2767	Jan. 4, 1963	Final Judgment
Well Surveys, Inc. v. Eastern Wire Line Services, Inc.	Western District Louisiana (Lafayette) No. 9259-L	Jan. 9, 1963	Dismissed
Well Surveys, Inc. v. R. C. Bennett dba Prairie Service Co.	Western District Texas (Pecos) No. 3711	Apr. 23, 1963	Consent Judgment
Well Surveys, Inc. v. Go Electronics Surveys, Inc.	Northern District West Virginia (Wheeling) No. 1225-W	May 24, 1963	Dismissed
Dresser Industries, Inc. v. Raymond F. Rathman dba Mike Rathman Logging Co.	Northern District Texas (Dallas) No. 7-74	May 14, 1964	Consent Decree
Dresser Industries, Inc. v. Texas Perforating Co.	Northern District Texas (Wichita Falls) No. 7-95	Sept. 21, 1964	Dismissed

That upon information and belief the records of the Clerks of the various Courts show that all have been terminated by consent judgment or dismissed, except the present suit, and the suit of Well Surveys, Inc. v. Perfo-Log, Inc., which is still pending.

Affiant alleges, on information and belief, that ninety to one hundred licenses or immunity agreements have been granted under said Swift patent.

/s/ R. Welton Whann
R. Welton Whann

Subscribed and sworn to before me this 14th day of July, 1966.

/s/ Claire LaBrash
Notary Public in and for the County of Los Angeles, State of California

My commission expires April 7, 1969.

Exhibit 2.

AFFIDAVIT OF WILLIAM A. SNYDER.

State of Kansas
County of Barton

William A. Snyder, being first duly sworn, deposes and says:

From January 1960 to spring of 1964, I was President of Perforators, Incorporated, which is a Kansas corporation.

From January 1960 to spring of 1964, the business of Perforators, Incorporated was to make radioactivity type surveys in open and cased holes, set bridging plugs in cased holes, and perform jet perforating in cased holes.

Sometime in September of 1962, Perforators, Incorporated entered into an immunity agreement with Well Surveys, Inc. under the Swift Patent No. 2,554,844 and the Mardock Patent No. 2,810,076 which was effective as of July 1, 1962.

Sometime in August of 1962, there was a meeting between affiant, William D. Witcraft, Vice President of Perforators, Incorporated, Marvin Thompson, attorney for Perforators, Incorporated, Howard McCoy, Secretary and Treasurer for Perforators, Incorporated, and Jay G. Beaver of Well Surveys, Inc. at the office of Marvin Thompson, which is 525 Main Street, Russell, Kansas. While discussing the immunity agreements between Perforators, Incorporated and Well Surveys, Inc., Mr. Beaver stated that Perforators, Incorporated would have to pay a 5% royalty on the service charge and a 5% royalty on the Gamma Ray logging charge. The service charge is a charge of $150.00 made for transporting the equipment to the well and

setting up the equipment for operating. Either affiant, Mr. Witcraft, or Mr. Thompson said to Mr. Beaver that Perforators, Incorporated should not have to pay a royalty on the service charge because the services which are the basis of the service charge are a separate operation from the making of a Gamma Ray log. As a comparison, it was agreed between Perforators, Incorporated and Well Surveys, Inc. that a 5% royalty would be paid on $50.00 of the service charge instead of the entire $150.00 service charge.

Sometime before the meeting in Mr. Thompson's office in August of 1962, Mr. Beaver told Mr. Witcraft and me that in the Well Surveys, Inc. versus McCullough Tool Company lawsuit, the Swift Patent No. 2,554,844 was held to be valid and infringed. Mr. Beaver led me to believe that the Well Surveys, Inc. versus McCullough Tool Company lawsuit was all done. As a result of this, Mr. Witcraft and I decided that it would be wise for Perforators, Incorporated to take a license under the Swift Patent.

Sometime in July, August, or September of 1962, I told Mr. Beaver that to avoid infringement of the Swift Patent No. 2,554,844, I would change Perforators, Incorporated's Gamma Ray tools so that they would send the Gamma Ray signals up one conductor and the casing collar signals up two conductors which are separate and distinct from the conductor up which the Gamma Ray signals are sent. Mr. Beaver told me that Gamma Ray logs made by multi-conductor Gamma Ray tools are covered by the Swift Patent No. 2,554,844 and that Perforators, Incorporated would not avoid infringing the Swift Patent by making the change I suggested. Because of my reliance upon

Mr. Beaver's statement, Perforators, Incorporated entered into the July 1, 1962 immunity agreement with Well Surveys, Inc., instead of changing its Gamma Ray tools to multi-conductor Gamma Ray tools.

From July 1, 1962, the effective date of the Perforators, Incorporated and Well Surveys, Inc. immunity agreement, to spring of 1964, Perforators, Incorporated paid a 5% royalty on $50.00 of the $150.00 service charge as well as a 5% royalty on the Gamma Ray logging charge, or $10.00, whichever is greater.

I have read the foregoing statements and they are true according to my personal knowledge.

/s/ William A. Snyder
WILLIAM A. SNYDER

State of Kansas
County of Barton

Subscribed to and sworn to before me on this 2nd day of June 1966.

LEALIA OPAL WEBSTER
Notary Public in and For the County of Barton, State of Kansas.

My commission expires June 13, 1966.

Exhibit 3.

AFFIDAVIT OF WILLIAM D. WITCRAFT

State of Kansas
County of Barton

William D. Witcraft, being first duly sworn, deposes and says:

I am President of Perforators, Incorporated.

From January 1, 1960 to spring of 1964, I was Vice President of Perforators, Incorporated and have been President since spring of 1964.

The business of Perforators, Incorporated is to make radioactivity type surveys in open and cased holes, set bridging plugs in cased holes, and perform perforating in cased holes. Perforators, Incorporated has never made a radioactivity tracer log.

Sometime in September of 1962, Perforators, Incorporated entered into an immunity agreement with Well Surveys, Inc. under the Swift Patent No. 2,554,844 and the Mardock Patent No. 2,810,076 which was effective as of July 1, 1962.

Sometime in August of 1962, there was a meeting between affiant, William Snyder, President of Perforators, Incorporated, Marvin Thompson, attorney for Perforators, Incorporated, Howard McCoy, Secretary and Treasurer for Perforators, Incorporated, and Jay G. Beaver of Well Surveys, Inc. at the office of Marvin Thompson, which is 525 Main Street, Russell, Kansas. While discussing the immunity agreements between Perforators, Incorporated and Well Surveys, Inc., Mr. Beaver stated that Perforators, Incorporated would have to pay a 5% royalty on the service charge and 5%

royalty on the Gamma Ray logging charge. The service charge is a charge of $150.00 made for transporting the equipment to the well and setting up the equipment for operating. Either affiant, Mr. Snyder, or Mr. Thompson said to Mr. Beaver that Perforators, Incorporated should not have to pay a royalty on the service charge because the services which are the basis of the service charge are a separate operation from the making of a Gamma Ray log. As a compromise, it was agreed between Perforators, Incorporated and Well Surveys, Inc. that a 5% royalty would be paid on $50.00 of the service charge instead of the entire $150.00 service charge. This agreement is set forth in the third paragraph of the letter from Mr. Beaver to Mr. Thompson, dated August 28, 1962, attached as Exhibit A.

Sometime before the meeting in Mr. Thompson's office in August of 1962, Mr. Beaver told Mr. Snyder and me that in the Well Surveys, Inc. versus McCullough Tool Company lawsuit, the Swift Patent No. 2,554,844 was held to be valid and infringed. Mr. Beaver led me to believe that the Well Surveys, Inc. versus McCullough Tool Company lawsuit was finished. As a result of this, Mr. Synder and I decided that it would be wise for Perforators, Incorporated to take a license under the Swift Patent, and therefore the immunity agreement, which is effective as of July 1, 1962, was entered into between Perforators, Incorporated and Well Surveys, Inc.

From July 1, 1962, the effective date of the Perforators, Incorporated and Well Surveys, Inc. immunity agreement, to the present date, Perforators, Incorporated has paid a 5% royalty on $50.00 of the $150.00

service charge as well as a 5% royalty on the Gamma Ray logging charge, or $10.00, whichever is greater. Attached as Exhibit B is a royalty report for the month of May 1964, which is a typical monthly royalty report submitted by Perforators, Incorporated to Well Surveys, Inc. and to which the royalty check as payment is attached. In Exhibit B, the fourth column from the left, which is headed "Additional Charge," is actually the service charge. The $50.00 figures under the column headed "Additional Charge" are the $50.00 portions of the $150.00 service charges upon which a 5% royalty is paid.

When Perforators, Incorporated runs a combination Gamma Ray, neutron and casing collar log, it pays a 5% royalty on the entire charge for the Gamma Ray, neutron, and casing collar log, and not merely 5% royalty on the Gamma Ray and casing collar log *or* neutron and casing collar log.

Attached as Exhibit C is a letter from Dresser Industries, Inc. received by affiant on or about May 7, 1965.

I have read the foregoing statements and they are true according to my personal knowledge.

/s/ William D. Witcraft
WILLIAM D. WITCRAFT

State of Kansas
County of Barton

Subscribed to and sworn to before me on this 2nd day of June 1966.

LEALIA OPAL WEBSTER
Notary Public in and For the County
of Barton, State of Kansas

My commission expires June 13, 1966.

Exhibit A.

WELL SURVEYS INC.

P. O. Box 1799 Houston 1, Texas

August 28, 1962

Mr. Marvin E. Thompson
Holland, Thompson & Holland
525 Main Street
Russell, Kansas

Re: Perforators, Inc.

Dear Mr. Thompson:

Attached are two copies of the Immunity Agreement covering Perforators, Inc. operations under the Swift and Mardock patents. Both copies of the Immunity Agreement have been completed and require signatures of the appropriate officials of the Company. Upon execution by Perforators, Inc., please return both copies to WSI for execution.

Attached also is supplement specifying the conditions of the Agreement in event that the Swift patent is held invalid.

As agreed during our meeting, the effective date of the license is to be July 1, 1962. The royalties will be due from this date forward. Royalties computed in accordance with Paragraph III shall distribute $50.00 of the service charge to the radioactivity logging operation involved.

We hope those conditions are satisfactory and shall expect to hear from you at an early date.

Yours very truly,

/s/ Jay G. Beaver
JAY G. BEAVER
Vice President

Attachments

cc: Perforators, Inc.
Post Office Box 811
Great Bend, Kansas

Exhibit B.

ROYALTY REPORT TO WELLS SURVEY, INC.

Company Perforating, Inc.

Month of May, 1964

Invoice Date	Invoice Number	Logging Charge	Additional Charge	Combination Charge	Royalty Basis	Royalty Due
5/6	796	150.00	50.00	200.00	200.00	10.00
5/15	797	150.00	50.00	200.00	200.00	10.00
5/19	798	200.00	50.00	750.00	250.00	12.50
5/4	919	263.00	50.00	313.00	313.00	15.65
5/4	920	75.00	50.00	125.00	125.00	10.00
5/4	921	75.00	50.00	125.00	125.00	10.00
5/22	923	150.00	50.00	200.00	200.00	10.00
5/23	924	150.00	50.00	200.00	200.00	10.00
5/25	925	150.00	50.00	200.00	200.00	10.00
						$98.15

Exhibit C.

DRESSER INDUSTRIES, INC.
Oil, Gas, and Chemical Equipment
Post Office Box 589
Houston, Texas 77001

May 7, 1965

TO LICENSEES UNDER PATENTS OWNED BY DRESSER INDUSTRIES, INC.

As a licensee of Dresser Industries, Inc. in the field of radioactivity well logging, you are probably aware of our pending litigation with McCullough Tool Company. The United States Court of Appeals for the Tenth Circuit, in an opinion issued March 17, 1965, has affirmed in all respects the opinion of the District Court which held, among other things, that U. S. Patent 2,544,844 to L. M. Swift, under which you are licensed, is valid and has been infringed by McCullough. The Court of Appeals also affirmed the District Court in holding that this patent is not being misused and is, therefore, enforceable against infringers.

The Opinion of the Court of Appeals has been published in the U. S. Patent Quarterly, Vol. 145, page 6, which is the advance sheet of April 5, 1965. The Opinion will also undoubtedly be carried in other legal reports. Since the Opinion is quite long we are not automatically sending copies to all of our licensees; however, if you would like a copy of the Opinion, please let me know and I will send one to you.

Yours very truly,

/s/ Jay G. Beaver
Jay G. Beaver
Manager of Patent Licensing

JGB/gc

Exhibit 4.

AFFIDAVIT OF LANDON N. ROBERTS

State of Texas
County of Wichita

Landon N. Roberts, being first duly sworn, deposes and says:

I am in the business of making Tracer Surveys, Gamma Ray Surveys, and Caliper Logs and have been in the business since October of 1961.

I do business under the fictitious name of Roberts Wireline Service Company.

I purchased all of my equipment from Radiation Engineering and Manufacturing Company.

I own and operate two Gamma Ray tools. I purchased the 3⅛" Gamma Ray tool sometime around October of 1961, and the 1¾" Gamma Ray tool sometime around October of 1962.

Sometime in April of 1962, Mr. Jay G. Beaver of Well Surveys, Inc. told me to take a license under the Swift Patent No. 2,554,844.

I did not answer Mr. Beaver. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

Sometime in June of 1962, Mr. Beaver again told me to take a license under the Swift Patent.

Again I did not answer Mr. Beaver. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

I did not come out and tell Mr. Beaver that I refused to take a license under the Swift Patent because other companies that refused to take a license under the Swift Patent were sued by Well Surveys, Inc. and I could not afford a suit with Well Surveys, Inc.

Sometime in September of 1962, Mr. Beaver again told me to take a license under the Swift Patent.

Again I did not answer Mr. Beaver. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

Again I did not come out and tell Mr. Beaver that I refused to take a license under the Swift Patent because other companies that refused to take a license under the Swift Patent were sued by Well Surveys, Inc. and I could not afford a suit with Well Surveys, Inc.

Sometime in January of 1963, Mr. Beaver again told me to take a license under the Swift Patent.

Again I did not answer Mr. Beaver. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

Again I did not come out and tell Mr. Beaver that I refused to take a license under the Swift Patent because other companies that refused to take a license under the Swift Patent were sued by Well Surveys, Inc. and I could not afford a suit with Well Surveys, Inc.

Sometimes in June of 1963, Mr. Beaver again told me to take a license under the Swift Patent.

Again I did not answer Mr. Beaver. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

Again I did not come out and tell Mr. Beaver that I refused to take a license under the Swift Patent because other companies that refused to take a license under the Swift Patent were sued by Well Surveys, Inc. and I could not afford a suit with Well Surveys, Inc.

Sometime in July of 1963, Mr. Beaver again told me to take a license under the Swift Patent.

Again I didn't answer Mr. Beaver. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

Again I did not come out and tell Mr. Beaver that I refused to take a license under the Swift Patent because other companies that refused to take a license under the Swift Patent were sued by Well Surveys, Inc. and I could not afford a suit with Well Surveys, Inc.

By letter dated February 19, 1964, Mr. Beaver again told me to take a license under the Swift Patent stating, "This matter has been pending for sometime and we feel the negotiations must be concluded without further delay. Please be prepared to do so during my forthcoming visit."

Again I didn't answer Mr. Beaver and evaded him during his visit. I did not feel like I could honestly and consciously take a license under the Swift Patent because I didn't think that Well Surveys, Inc. had anything which applied to what I was doing.

Again I did not come out and tell Mr. Beaver that I refused to take a license under the Swift Patent because other companies that refused to take a license under the Swift Patent were sued by Well Surveys, Inc. and I could not afford a suit with Well Surveys, Inc.

By letter dated May 7, 1965, Mr. Beaver inferred that Dresser Industries, Inc. would sue me if I didn't take a license under the Swift Patent. In that letter Mr. Beaver said: "The United States Court of Appeals for the Tenth Circuit in Denver has upheld the validity of Swift Patent 2,544,844 and affirmed that this patent was infringed by McCullough Tool Company. The Opinion of the Court of Appeals has been published in the U. S. Patent Quarterly, Vol. 145, page 6, which is the advance sheet of April 5, 1965. The Opinion will also undoubtedly be carried in other legal reports. Since the Opinion is quite long we are not automatically sending copies; however, if you would like a copy of the Opinion, please let me know and I will send one to you."

"It has come to our attention that operations carried out by you infringe the Swift Patent. We are prepared to offer you a license at a reasonable royalty under this patent. We also have a number of other patents relating to radioactivity well logging under which we would be willing to grant you a license either singly or in any combination that you desire, also at a reasonable royalty. We have licensed the very great majority of wireline service companies under the Swift Patent."

"We understand that you have been offering services that infringe the Swift Patent in the past and we will expect settlement for past infringement at the time a

license agreement is signed. I shall be glad to meet with you to discuss this matter in the near future."

"We fully intend to continue to inforce the Swift Patent against unlicensed infringers by bringing suit in the Federal Courts."

As a result of the inference by Mr. Beaver in his letter dated May 7, 1965, I consented to take a license under the Swift Patent because I didn't feel I could fight the power of Dresser Industries, Inc.

On June 15, 1965, I signed a license agreement with Dresser Industries, Inc. under the Swift Patent. At the time I signed the agreement I said to Mr. Beaver, "I don't feel like I am doing the right thing because I don't feel that I infringe the Swift Patent by running Gamma Ray logs."

As a result of this license agreement, I was forced to make a higher charge to my customers. This higher charge is shown on the invoices to my customers as a royalty charge.

I have read this affidavit and the statements herein and they are true in accordance with my personal knowledge and belief.

/s/ Landon N. Roberts
Landon N. Roberts

State of Texas
County of Wichita

Subscribed to and sworn to before me on this 31st day of May 1966.

/s/ Jack Wallace
Jack Wallace
Notary Public in and for County
of Wichita, State of Texas.

My Commission expires 1 June 1967

Exhibit 5.

AFFIDAVIT OF RAYMOND F. RATHMAN

State of Texas
County of Wichita

RAYMOND F. RATHMAN, being first duly sworn, deposes and says:

I am in the business of making cased hole Gamma Ray logs and open hole Resistivity logs.

I do business under the fictitious name and style of Mike Rathman Logging Company.

I own and operate five (5) Gamma Ray logging tools, which I purchased from Radiation Engineering and Manufacturing Company. One of my Gamma Ray logging tools is designed to send the Gamma Ray signal and the casing collar signal independently up a single conductor. My other 4 Gamma Ray logging tools are designed to send the Gamma Ray signal up one conductor and the casing collar signal up two conductors which are separate and distinct from the conductor that the Gamma Ray signal is sent up.

In 1964 Dresser Industries, Inc. sued me for patent infringement and charged that surveys made by my single conductor Gamma Ray tool and my multi-conductor Gamma Ray tools infringed the Swift Patent No. 2,554,844.

In 1965, I signed a license agreement with Dresser Industries, Inc. under the Swift Patent No. 2,554,844. Mr. Jay G. Beaver of Dresser Industries, Inc. told me that under the license agreement I had to pay royalties on surveys made by my single conductor Gamma Ray tool as well as those made by my multi-conductor

Gamma Ray tools. Accordingly, I pay Dresser Industries, Inc. royalties on surveys made by my single conductor Gamma Ray tool and my multi-conductor Gamma Ray tools.

I have read the foregoing statements and they are true according to my personal knowledge.

/s/ Raymond F. Rathman
Raymond F. Rathman

State of Texas
County of Wichita

Subscribed to and sworn to before me on this 1st day of June 1966.

/s/ Jack Wallace
Jack Wallace
Notary Public in and for the
County of Wichita, State of Texas

My commission expires June 1, 1967.

Exhibit 6.

AFFIDAVIT OF WELTON B. WHANN

State of California
County of Los Angeles

WELTON B. WHANN being first duly sworn, deposes and says:

Attached hereto is a photocopy of a letter handed to affiant on June 3, 1966 by William T. Wofford, Esquire, attorney of record for Mike Rathman Logging Co. in Dresser Industries, Inc. vs. Mike Rathman Logging Co. in the United States District Court for the Northern District of Texas.

On June 3, 1966 Mr. Wofford advised affiant that the attached letter was received by him from James B. Simms, attorney for Dresser Industries, Inc. in connection with the above referred to case between Dresser Industries, Inc. and Mike Rathman Logging Co.

/s/ Welton B. Whann
Welton B. Whann

Subscribed and sworn to before me this 11th day of July, 1966.

/s/ Claire LaBrash
Notary Public in and for said
County of Los Angeles, State of
California

My Commission Expires: April 7, 1969.

(SEAL)

Browning, Simms, Hyer & Eickenroht
Attorneys at Law
P.O. Box 66026—3400 Montrose Blvd.
Houston, Texas 77006

July 10, 1964

Mr. Wm. T. Wofford
1704 First National Bank Bldg.
Fort Worth, Texas 76102

Re: Our File LW-9
Dresser vs. Mike Rathman
Logging Co.

Dear Mr. Wofford:

With regard to the various matters raised in your letter of July 8, 1964, all that we can go along with is the suggested waiver of paragraph 3.04(a). This could be done by a letter transmitting the executed agreement which would waive the provisions of the paragraph subject to the agreement of Mike Rathman Logging Company to keep sufficient information with regard to customers' names to permit this to be picked up on an audit if such an audit should ever become necessary under the provisions of paragraph 3.06.

Paragraph 3.05 is one which is insisted upon by Dresser and is in all of the eighty some odd licenses outstanding. It protects against the situation where either a licensee would have no price schedule covering a certain situation or would adopt a fictitiously low price schedule for the particular service covered by the patent when run in combination with other services.

It is, of course, Dresser's position that the Mike Rathman Logging Company operations come under the Swift

patent where the operations are run simultaneously whether they are conducted on a single conductor line or multi-conductor line. In view of this, the accounting previously requested is insisted on and the operation records should provide sufficient information to determine whether or not the particular operation was conducted simultaneously or non-simultaneously. If not, the logs themselves may be resorted to, to make this determination.

As to your inquiry regarding other Dresser patents, this was just something I wanted to call to your attention as you have a much more thorough knowledge of Rathman's equipment and operations than I have. It is true that if at a later date, an additional patent is desired to be included in the license, it can be licensed. The royalty rate will not change except as the base changes because it calls for payment of royalties on operations covered by the additional patents.

Please let me have your response at your early convenience.

Very truly yours,

BROWNING, SIMMS, HYER & EICKENROHT

/s/ James B. Simms

By James B. Simms

JBS:tbl

cc: Mr. R. W. Mayer
Mr. Jay Beaver
Mr. Edwin Luecke

In the United States Court of Appeals, for the Tenth Judicial Circuit, Sitting at Denver, Colorado.

Seventh Day, July Term, Friday, July 22nd, 1966.

Present: Honorable Alfred P. Murrah, Chief Judge, Honorable Orie L. Phillips, Circuit Judge, Honorable Warren L. Jones, Circuit Judge, Honorable Jean S. Breitenstein, Circuit Judge, Honorable Oliver Seth, Circuit Judge, Honorable John J. Hickey, Circuit Judge, And other officers as noted on the 14th day of July, 1966.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable Jean S. Breitenstein and Honorable Delmas C. Hill, Circuit Judges.

McCullough Tool Company, Robert W. Pringle, Kenneth I. Roulston, George M. Brownell and Philip W. Martin, Appellants, 6952 vs. Well Surveys, Incorporated, and Dresser Industries, Inc., a corporation, Appellees.

McCullough Tool Company, Appellant, 6953 vs. Well Surveys, Inc., Appellee.

Appeals From the United States District Court for the Northern District of Oklahoma.

On consideration of appellants' motion to modify this court's mandate of March 14, 1966, to permit filing a motion in United States District Court for the Northern District of Oklahoma to vacate the interlocutory judgment entered March 16, 1961, with respect to Swift Patent 2,554,844 and to hold said patent invalid and non-infringed, to dissolve the injunction against appellant, McCullough Tool Company, and to permit the District Court to conduct such proceedings and

take such action as it may consider appropriate; appellants' motion to recall the mandate of March 14, 1966; and appellants' petition for rehearing;

It is ordered that leave to file the above described motions be and the same is hereby granted.

It is further ordered that each of the above motions be and the same are hereby denied.

A true copy as of record,

Teste:
ROBERT B. CARTWRIGHT, Clerk,
/s/ By WILLIAM L. WHITAKER
Chief Deputy Clerk